UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DENNIS BOOKER,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 4:00 CV 1007 ERW
	)	DDN
AL LUEBBERS,	)	
	)	
Respondent.	)	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

This matter is before the court upon the petition of Dennis Booker for writ of habeas corpus pursuant to 28 U.S.C. § 2254. This matter was referred to the undersigned United States Magistrate Judge for review and a recommended disposition under 28 U.S.C. § 636(b).

In August 1995, petitioner was found guilty by a jury, in the Circuit Court of St. Louis City, Missouri, of second-degree murder, assault in the first degree, and two counts of armed criminal action. He was sentenced to two life sentences and two twenty-five year sentences, all to run consecutively. Petitioner moved for post-conviction relief under Missouri Supreme Court Rule 29.15. An evidentiary hearing was conducted and the motion was denied. Upon consolidated appeal, the Missouri Court of Appeals affirmed both petitioner's convictions and the denial of his Rule 29.15 motion.

After his motion to transfer to the Missouri Supreme Court was denied, petitioner commenced the present action, asserting the following grounds for habeas relief:

1. The trial court violated petitioner's right to a fair trial by denying his motion for a mistrial based on the prosecutor asking petitioner's alibi witness if she knew that a friend of petitioner's died while committing a

robbery, thereby allowing the jury to improperly infer petitioner's criminal character by association.

2. The trial court violated petitioner's right to a fair trial before an impartial judge by "rebuking" defense counsel in front of the jury for objecting to the above question and asking for a mistrial.

3. Petitioner received ineffective assistance of trial counsel by counsel's failure to investigate, interview, and present the testimony of three named witnesses to the crime.

4. Petitioner received ineffective assistance of trial counsel, because counsel did not inform him that it was his decision whether or not to testify and did not honor his request to testify.

5. His constitutional rights were violated by the trial court denying his Batson challenges to the prosecutor's use of peremptory strikes against African-American venirepersons.

The State concedes that all claims have been properly preserved for federal habeas review. See Response, filed Aug. 10, 2001, at 2 (Doc. No. 7).

The Missouri Court of Appeals summarized the evidence at trial as follows:

> At about 11:00 p.m. on July 14, 1994, Defendant [then 16 years old] and his friend Calvin Coleman ("Codefendant") noticed Victoria McBeath standing near a parked car talking to Sam Stewart and his cousin Maurice as they sat in the car. Defendant shoved McBeath and asked her, "[h]ow are you going to have a boy to come see you when your boyfriend is out here?" As Defendant and Codefendant walked away, McBeath said, "go on Crazy, go on Crazy." "Crazy" is Defendant's street name. Moments later Defendant and Codefendant returned with an assault rifle. Sam saw the gun and started to drive away. Defendant shot Sam and Maurice. Maurice died from the gunshot wounds and Sam suffered serious injuries. Sam later identified Defendant as the shooter in a photographic lineup.

Resp. Exh. 14 at 2. Petitioner, who had no prior convictions, did not testify at trial. He presented two witnesses, his girlfriend and his mother, who testified that he was at home with them on the evening of the shootings.

Standard of Review

Habeas relief may not be granted on a claim that has been adjudicated on the merits in state court proceedings unless the adjudication of the claim

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). "A state court's decision is contrary to clearly established law if the controlling case law requires a different outcome either because of factual similarity to the state case or because general federal rules require a particular result in a particular case." Richardson v. Bowersox, 198 F.3d 973, 977-78 (8th Cir. 1999) (cited case omitted), cert. denied, 120 S. Ct. 1971 (2000). The issue a federal habeas court faces when deciding whether a state court unreasonably applied federal law is "whether the state court's application of clearly established federal law was objectively unreasonable." Williams v. Taylor, 529 U.S. 362, 409 (2000) (plurality opinion). "As with 'reasonableness' in evaluating the application of clearly established law, that a federal habeas court might believe the findings of the state court to be incorrect does not mean they are unreasonable under § 2254(d)(2)." Kinder v. Bowersox, 2001 WL 1444721, at *4 (8th Cir.

Nov. 16, 2001) (citing Weaver v. Bowersox, 241 F.3d 1024, 1030 (8th Cir. 2001)). Furthermore, a determination of a factual issue made by a state court is presumed to be correct and must be rebutted by clear and convincing evidence. Id., § 2254(e)(1).

Grounds 1 and 2 - Denial of a Fair Trial

At trial, petitioner's girlfriend Tiffany Britton testified that petitioner was with her at the time of the shootings. She testified that petitioner's good friend Ernest Brown was killed on July 13, 1994, and she was consoling petitioner on the night of July 14 when the shootings occurred. On cross-examination, the prosecutor asked Britton whether she knew that Brown had died while robbing someone. Id. at 866. The trial court mistakenly believed that the prosecutor had asked if Britton knew that Brown had died while being robbed, not while robbing someone. Id. at 943. Defense counsel objected to the question, and the following exchange ensued:

> MS. BLACK [defense counsel]: Object, Your Honor. There's no evidence of that.
>
> [Prosecutor]: Judge, she says she knows all about that.
>
> The COURT: If she knows.
>
> MS. BLACK: Your Honor, that assumes facts not in evidence. May we approach and make a record?
>
> THE COURT: Objection is overruled.
>
> MS. Black: May we make a record?
>
> Q. Isn't it true that he got robbed?
>
> THE COURT: Let the record show that I have overruled the objection. Counsel, let's proceed. I have ruled. We are proceeding. Do you understand that?

MS. BLACK: Are you denying my request to make a record?

THE COURT: I'm denying it. Let's proceed.

MS. BLACK: That's what I wanted to know.

Q. Isn't it true that a good friend of Dennis Booker got killed robbing somebody?

A. I don't know.

* * *

Q. The person he was robbing shot him. Isn't that correct?

MS. BLACK: Your Honor, I move for a mistrial. This is—

THE COURT: Motion is denied.

MS. BLACK: This is totally improper.

[Prosecutor]: Cross-examination.

THE COURT: Ms. Black I have ruled. You are making a speaking objection. You know that's against the rules. And you know these rules are designed for a fair trial. And I can only assume that if you proceed to do this, you are not interested in a fair trial. And let's proceed. Sit down, I have ruled.

MS. BLACK: I move for a mistrial, based on the court's statement just now.

The COURT: You invited that ruling. The motion is denied. Let's proceed.

Ms. BLACK: I object to the relevancy.

THE COURT: Let's proceed.

Id. at 867-68.

The next day, petitioner renewed his motion for a mistrial based on the prosecutor's questions about Brown's cause of death.

After being apprized of the actual nature of the question, the court said, "I do have a problem about bringing out the fact that Ernest was robbing someone. You know, it's just one of those things where the prejudicial value outweighs the probative value." Id. at 945. The court denied the request for a mistrial, but granted petitioner's alternate request for a cautionary instruction and instructed the jury to disregard any question or answer concerning the circumstances of Brown's death. Id. at 975. During deliberation, the jury inquired whether they could discuss Ernest Brown, if they did not discuss the manner of his death. Resp. Exh. 9 at 91. The trial court responded, "you are to disregard any question or answer concerning the circumstances (manner) of Ernest Brown's death." Id.

On direct appeal, the Missouri Court of Appeals held that the trial court did not abuse its discretion in failing to grant the request for a mistrial. The appellate court also held that the challenged questioning was appropriate to test Britton's credibility as to whether petitioner actually spent the night of the shootings with her, grieving Brown's death. Resp. Exh. 14 at 5.

Questions concerning the admission of evidence are matters of state law, and it is not for a federal habeas court to re-examine state-court determinations on state-law questions. Estelle v. McGuire, 502 U.S. 62, 67 (1991). Rather, the only question in a habeas proceeding is whether the conviction violated the constitution, id., that is, whether the admission of particular evidence resulted in a trial so fundamentally unfair as to deny petitioner due process of law. Rainer v. Department of Corrections, 914 F.2d 1067, 1072 (8th Cir. 1990) (quoted case omitted), cert. denied, 489 U.S. 1099 (1991).

There is an "almost invariable assumption of the law that jurors follow their instructions." United States v. Edwards, 159 F.3d 1117, 1124 (8th Cir. 1998) (quoted case omitted). Furthermore, "[c]urative measures are normally sufficient to mitigate any potential prejudice that may result from a witness's statement or behavior." Phea v. Benson, 95 F.3d 660, 662 (8th Cir. 1996). The undersigned concludes that here the admission of evidence of Brown's manner of death, and then the withdrawal of that evidence with a cautionary instruction, did not result in a trial so fundamentally unfair as to deny petitioner due process.

Petitioner's due process claim based on the trial court's comments to defense counsel for continuing to object to the question about Brown's death, was reviewed by the Missouri Court of Appeals for plain error, because petitioner did not raise the claim in his motion for a new trial. The appellate court held that the comments did not amount to plain error in that they neither expressed an opinion on the evidence nor on petitioner's guilt or innocence, nor indicated bias against defense counsel. Resp. Exh. 14 at 5-6. This court's review of the claim is, thus, limited to determine whether "manifest injustice" resulted from the trial court's comments. See Thomas v. Bowersox, 208 F.3d 699, 701 (8th Cir.) (habeas petitioner suffered no manifest injustice as a result of allegedly improper comments by the trial court, as required to prevail on due process claim reviewed by state appellate court for plain error), cert. denied, 531 U.S. 967 (2000). The undersigned concludes that petitioner sustained no manifest injustice. In sum, the adjudication of grounds 1 and 2 by the state courts did not result in an unreasonable determination, and they should be denied.

Grounds 3 and 4 - Ineffective Assistance of Trial Counsel

In ground 3, petitioner asserts he was denied effective assistance of counsel by counsel's failure to investigate, interview, and present the testimony of Deon Smith, Travis Like, and Victoria McBeath. In ground 4, he asserts that defense counsel did not inform him that it was his decision whether or not to testify, and did not honor his request to testify. To prevail on these claims, petitioner must demonstrate that his attorney's performance fell below an objective standard of reasonableness, and that the deficient performance was prejudicial in that the result of the proceeding would have been different absent the error. See Strickland v. Washington, 466 U.S. 668, 687 (1984).

At sentencing, petitioner testified that he believed his counsel adequately defended him:

> Q: [Trial Judge]: Did [counsel] do the things that you asked her to do prior to and during trial, or did she ever fail or refuse to do anything you asked her to do?
>
> A: [Petitioner]: No, sir.
>
> Q: Are you satisfied with the legal service rendered on your behalf by [counsel] in this case?
>
> A: Yes, Your Honor, I am.
>
> Q: Did you ever give her the names of any other witnesses you wanted to have called?
>
> A: No, sir.
>
> Q: Are you satisfied that she properly investigated the case on your behalf?
>
> A: Yes, sir.

Resp. Exh. 7 at 1065-66.

Both claims of ineffective assistance of counsel now asserted by petitioner were raised in his motion for state post-conviction relief. Resp. Exh. 10 at 3-15, 23-47. Smith, Like, and McBeath were the only witnesses who testified at the hearing on this motion. They each testified that they were present when the shootings took place, that they did not see petitioner at the scene, that two men with the street names of "Mike T" and "the squirrel" did the shooting, and that they did not tell the police what they saw. McBeath testified that she did not see Like and Smith at the scene. Like and Smith testified that they were not contacted by defense counsel. McBeath, who had been endorsed as a witness by both the State and petitioner's codefendant, attended the trial but was not called to testify. Resp. Exh. 8.

The motion court noted that the deposition testimony of petitioner and defense counsel had not been submitted in the time frame provided. The court found that Smith, Like, and McBeath "were not credible based on their demeanor, and in part because McBeath did not see the other two, and none of the witnesses came forward or spoke with the police." Resp. Exh. 10 at 60. Accordingly, the trial court rejected petitioner's ineffective assistance claim based on counsel's failure to call these witnesses. The court also rejected petitioner's claim that trial counsel did not inform him of his right to testify or allow him to testify at trial, because petitioner presented no evidence in support of this allegation. Id. at 59.

Two days after the court issued its decision, petitioner filed a motion to reconsider along with his deposition. In the deposition, petitioner testified that, when he told defense counsel both before and during trial that he wanted to testify, she told him it was her decision to make. He further testified that he had

no prior convictions and that, had he taken the stand, he would have testified that he was home at the time of the shootings, grieving for his friend. Petitioner further testified in his deposition that he gave counsel, both verbally and by letter, the names of Smith, Like, and McBeath, who were named in the police report as being at the scene and, thus, could prove his innocence. Id. at 6-7, 74-80.

The motion court denied the motion to reconsider, finding that petitioner's deposition testimony both as to his desire to testify and the witnesses he wanted called, was not credible, because it was in direct conflict with his testimony at sentencing and because "it appear[ed] to be tailored to fit the claims after the fact rather than his desires at the time of trial." Id. at 90-91.

The Missouri Court of Appeals held that the motion court did not clearly err in finding Smith, Like, and McBeath not credible and, thus, in concluding that petitioner failed to meet his burden of proving that the failure to call these witnesses prejudiced him. The appellate court also affirmed the motion court's reasoning and decision on the claim that trial counsel misinformed him about his right to testify and did not honor his desire to do so. Resp. Exh. 14 at 7.

With regard to ground 3, the undersigned concludes that petitioner has not offered clear and convincing evidence to rebut the presumption of correctness that attaches to the trial court's finding that Like, Smith, and McBeath were not credible. Based on that finding, the state courts' adjudication of this claim is not the result of an unreasonable application of Strickland, or based on an unreasonable determination of the facts.

Ground 4 causes the undersigned more pause, because it implicates petitioner's independent right to testify. A criminal

defendant has a constitutional right to testify at his trial, Rock v. Arkansas, 483 U.S. 44, 49 (1987), and any waiver of this fundamental constitutional guarantee must be knowing and voluntary, Frey v. Schuetzle, 151 F.3d 893, 898 (8th Cir. 1998) (habeas petitioner voluntarily and knowingly waived his right to testify, despite his claim that he believed counsel alone had the power to decide whether he would testify, where counsel testified that he informed petitioner of his right to testify, but advised against it and that petitioner consented to this advice).

Mindful, however, of the strict standard of review set forth in 28 U.S.C. §§ 2254(d) and (e), the undersigned concludes that this ground for relief should also be denied. The motion court was entitled to not believe petitioner's deposition testimony that counsel misinformed him about his right to testify and that he did not know he had such a right. See Riggins v. Norris, 238 F.3d 954, 955 (8th Cir. 2001) (even though there was no evidence at state post-conviction hearing contradicting petitioner's testimony that trial counsel failed to convey a favorable plea offer, the state trial court was entitled to disbelieve petitioner's self-serving testimony).

Petitioner's testimony that counsel did not honor his repeated requests to testify is contradicted by petitioner's testimony at sentencing that trial counsel did not fail or refuse to do anything petitioner asked her to do.

The undersigned concludes that petitioner has not overcome "the presumption that the state courts made a correct assessment." See id. Accordingly, the state court denials of this claim were not the result of an unreasonable application of Strickland or Rock v. Arkansas, nor based on an unreasonable determination of the facts. See Frey v. Schuetzle, 151 F.3d at 898 (a knowing and

voluntary waiver of the right to testify may be found based on a defendant's silence when his counsel rests without calling him to testify).[1]

Ground 5 - Batson

In his last claim, petitioner contends that his constitutional rights were violated, because the trial court allowed the prosecutor to use five peremptory strikes to strike African-American venirepersons, in contravention of Batson v. Kentucky, 476 U.S. 79 (1986). In Purkett v. Elem, 514 U.S. 765 (1995), the Supreme Court explained the three-step process for determining the validity of peremptory strikes.

> Under our Batson jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination. The second step of this process does not demand an explanation that is persuasive, or even plausible.

Id. at 767-68 (citations omitted).

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[1]Given the recommended disposition of this claim, the fact that petitioner did not assert a stand-alone constitutional claim that he did not knowingly and voluntarily waive his right to testify, but rather framed it as an ineffective assistance of counsel claim, need not be addressed. See Frey v. Schuetzle, 78 F.3d 359, 361-62 (8th Cir. 1996) (district court erred in granting habeas relief on ground that petitioner did not knowingly and voluntarily waive his right to testify where petitioner couched the claim as ineffective assistance of counsel; case remanded, noting that district court could allow petitioner to amend his petition to assert a separate claim that his right to testify was violated).

In the present case, the trial court asked the prosecutor to state his reasons for each peremptory strike exercised against an African-American venireperson. The prosecutor offered the following reasons: one venireperson was perceived as strong willed, had corrected defense counsel and may have been antagonized by him, when he was questioning another venireperson, Resp. Exh. 3 at 419-21; another looked "disgusted" with how long voir dire was taking, was late in getting back from lunch, and was attractive to the point of possibly distracting the male jurors, id. at 424-26; another was a witness to a drug arrest and agreed with defense counsel that a victim of a crime may be mistaken as to the identification of the perpetrator, id. at 429-30; another previously sat as a juror during a trial in which defense counsel had participated, id. 439-42; and another was 73 years old, and was disabled and would have to be accommodated by sitting in the hallway outside the courtroom where she could hear the proceedings,[2] id. at 447-48. The trial court allowed these strikes after defense counsel was given the opportunity to try to demonstrate that they were racially motivated.[3]

The Missouri Court of Appeals also rejected petitioner's Batson claim, holding that "[t]he state proffered valid race neutral explanations for each of the venirepersons in question. Defendant then failed to prove that the proffered reasons were

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[2]The undersigned infers from the record that this juror used a wheelchair or walker.

[3]The undersigned notes that the trial court did not allow the prosecutor to use a peremptory strike against an African-American where the prosecutor's stated reason for the strike was that this venireperson was the victim of a robbery of her purse which she did not report to the police, and had been a juror on a rape case. Id. at 434-35.

merely pretextual and that the strikes were racially motivated." Resp. Exh. 14 at 8.

In considering this claim, this court's deference to the fact-finding of the state trial court is "'doubly great . . . because of the unique awareness of the totality of circumstances surrounding voir dire.'" See Weaver v. Bowersox, 241 F.3d at 1030 (quoting United States v. Moore, 895 F.2d 484, 485 (8th Cir. 1990)). Reasons similar to those proffered here by the prosecutor have been recognized by the Eighth Circuit as race-neutral for purposes of Batson. See, e.g., id. at 1027 (reluctance and hesitation in answering questions, lack of eye contact with the prosecutor, lack of strength, and "cutting up" and talking during voir dire); United States v. Martinez, 168 F.3d 1043, 1047 (8th Cir. 1999) (marital status, age, body position and eye contact during voir dire suggesting "an attitude unfavorable to the government"); United States v. Carr, 67 F.3d 171, 175 (8th Cir. 1995)(unemployment and thus having no stake in the community), cert. denied, 516 U.S. 1182 (1996)). Upon review of the voir dire transcript, the undersigned concludes that the state courts' adjudication of this claim is neither contrary to, nor an unreasonable application of, federal law, nor based on an unreasonable determination of the facts.

RECOMMENDATION

For the above-mentioned reasons, it is the recommendation of the undersigned United States Magistrate Judge that the petition of Dennis Booker for writ of habeas corpus be dismissed with prejudice.

The parties are advised that they have ten (10) days in which to file written objections to this Report and Recommendation. The failure to file timely written objections may result in a waiver of the right to appeal issues of fact.

DAVID D. NOCE
UNITED STATES MAGISTRATE JUDGE

Signed this _____ day of December, 2001.